No. 7657

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY W. BERDIE, et al,
*Defendants and Appellants,*

*vs.*

CHARLES J. KURTZ, et al,
*Plaintiffs and Appellees.*

## SUPPLEMENTAL BRIEF OF APPELLEES

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## AUTHORITIES CITED

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Come now the Appellees and by leave of Court first had and obtained, file this, their supplement to appellees' brief heretofore filed herein.

Paragraph XLVIII of the Supplemental Bill alleges that defendant, Milk Producers, Inc., did, on or about the 17th day of July, 1934, commence an action in the Superior Court of Los Angeles County against Lucerne Cream & Butter Company to collect and recover judgment for the amount claimed to be due Milk Producers, Inc., from Lucerne Cream & Butter Company under the terms and provisions of License No. 17 as illegally fixed by the defendant Los Angeles Milk Industry Board, for the period November 20, 1933, to May 31, 1934, and threatens to and will institute similar actions against each of the other plaintiffs herein, to collect like amounts

and threatens to and will prosecute such suits to judgment unless restrained from so doing by order of this Court.

These allegations are not denied, but, on the contrary, are expressly admitted in the affidavits filed by these parties.

It will be seen that the suit in the State Court was commenced six months after this action was commenced in the Federal Court and involves exactly the same subject matter, to-wit, the validity of the charges made by Los Angeles Milk Industry Board and Milk Producers, Inc., which in turn involves the validity of License No. 17 and the Agricultural Adjustment Act under which it purports to have been issued, and the validity of the provisions of License No. 57 attempting to continue obligations under the old License.

Counsel have raised the point that the Federal Court has no jurisdiction to restrain proceedings in a State Court, citing as authority therefor, Section 379 of the United States Codes, Anno., which is Section 265 of the Judicial Code. The provisions of this section are the same as were formerly contained in Section 720 of the Revised Statutes. We find, however, that such is not the rule.

15 *Corpus Juris,* 1179:

> "Exceptions to the rule, however, exist where action by the federal court may be necessary to render effective a decree of such court; or where such court has been vested with priority of jurisdiction over the subject matter and the parties, and in order to protect its jurisdiction it is necessary to enjoin

the proceedir ; in the state court, as in case of bankruptcy proceedings, or where the state court was without jurisdiction. So also a federal court, where the circumstances necessary to give it jurisdiction exist, may enjoin the enforcement of a judgment of a state court in a proper case."

*Simpkins Federal Practice,* Sec. 740, page 696:

"By Section 265 of the Judicial Code, injunction shall not be granted to stay proceedings in a state court except in bankruptcy cases. . . . HOWEVER WE SHALL SEE FURTHER THAT THE LIMITATION DOES NOT APPLY TO AN INJUNCTION ISSUED BY THE FEDERAL COURTS IN DEFENSE OF ITS JURISDICTION OF A CAUSE OF ACTION WHEN THE RES IS IN POSSESSION OF THE COURT."

Section 742, page 697:

"Section 265 of the Judicial Code does not apply when the court is seeking to maintain its own jurisdiction over the subject matter, the possession of which has been first obtained by the court."

15 *Corpus Juris,* page 1180:

"It has also been held that a federal court may . . . prevent a person from being subject to a multiplicity of suits."

*Iron Mountain R. Co. v. City of Memphis,* 96 Fed. 113-131:

"We conclude, therefore, that the bill stated a good cause of action on the ground that the resolu-

tion of the city of March 25, 1898, impaired the obligation of the contract under which the railroad company occupied Kentucky Avenue. . . . This gave to the court below jurisdiction of the whole controversy between the city and the railroad company; and, inasmuch as the suit had been brought a considerable time before the state suits were brought, it justified and required the court below to enjoin the suits in the state court as an impairment of its jurisdiction over the controversy with which it had been invested by the filing of the bill. That such a remedy is not in conflict with section 720 of the Revised Statutes, forbidding the federal courts to issue injunctions against proceedings in a state court, is abundantly established by authority."

*Phelps v. Mutual Reserve Fund Life Association,* 112 Fed. 453, 465:

"Thus it has been held that the statute (section 720) does not prevent a court of the United States from protecting its own prior jurisdiction over the property in controversy" (citing Iron Mountain R. Co. v. City of Memphis, supra).

In *Kansas City Gas Co. v. Kansas City,* 198 Fed. 500, at *page* 526, the Court said:

"VII. There remains to consider whether the suit subsequently brought by defendants in the state court produces a conflict with a prior jurisdiction of the same parties and subject-matter in this court, and whether the injunctive process of this court should be extended to restrain defendants from prosecuting that suit until the issues in this case have been fully determined. The rule is well settled that, when the jurisdiction of a court of the

United States has attached, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subsequent action or proceeding of the defendant respecting the same subject-matter in a state court. Mr. Justice Field, in Sharon v. Terry (C.C.), 36 Fed. 337:

" 'It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For, if any one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process of contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.' Peck v. Jennes, 7 How. 612-624, 12 L. Ed. 841; Moran v. Sturgis, 154 U. S. 256-269, 14 Sup. Ct. 1019, 38 L. Ed. 981.

"In Starr et al v. Chicago, R. I. & P. Ry. Co. et al (C.C.) 110 Fed. 3, Judge Sanborn said:

" 'Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. * * *

" 'The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may, and if it discharges its duty it must, if necessary, issue its injunction to prevent any interference by any one with its effectual determination of the issues, and its administration of the rights and remedies involved in the litigation.'

"The Supreme Court, in Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, states the proposition thus:

" 'When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.'

"See, also, Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (NS) 932, 14 Ann. Cas. 764.

"In United States v. Eisenbeis et al (C.C.A.), 112 Fed. 190, 50 C. C. A. 179, the court said:

" 'The general rule is well settled that, where different courts have concurrent jurisdiction, the court which first acquires jurisdiction of the parties, the subject-matter *the specific thing,* or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. It is the duty of the court which first obtains *full and complete* jurisdiction over the *whole* case to keep control of it, to the exclusion of the other court that had not obtained such full jurisdiction and to grant the relief prayed for. This general principle is well settled. The only difficulty lies in its application to the facts of any given case.'

"And so it is said in Prout v. Starr, 188 U. S. 537-544, 23 Sup. Ct. 398, 47 L. Ed. 584:

" 'The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the state court.'

"In Rodgers v. Pitt (C.C.), 96 Fed. 668-70, the reason of the rule is thus emphasized:

" 'This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, national and state, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary law, and a citation of all the authorities in its support would be endless and useless.'

"Where the federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the Circuit Court, that court has jurisdiction, and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the federal questions or deciding them adversely to the party claiming their benefit. Siler et al v. Louisville & Nashville R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Risley et al v. City of Utica et al (C.C.), 179 Fed. 875-882."

In the case of *St. Louis Min. & Mill Co. v. Montana Mining Co.,* 148 Fed. 450, at page 454, the Supreme Court in construing the decision in the case of *Julian v. Central Trust Co.,* 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 624, said:

> "In such cases," said the court, "where the federal court acts in aid of its own jurisdiction, and to render its decree effectual, it may, notwithstanding section 720, Rev. St., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction." (Cited in Riverdale Mills v. Mfg. Co., 198 U. S. 196); 25 Sup. Ct. 620, 49 L. Ed. 1008; Dietzsch v. Huidekoper, 103 U. S. 494.)

*Sovereign Camp, v. O'Neill,* 266 U. S. 292, 69 L. Ed. 293, at page 296:

> "The jurisdiction thus acquired was not taken away by Sec. 265 of the Judicial Code, providing that, except in bankruptcy cases, 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.' This section does not deprive a district court of the jurisdiction otherwise conferred by the Federal statutes, but merely goes to the question of equity in the particular bill; making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which relief by injunction is prohibited by this section or may nevertheless be granted. Smith v. Apple, 264 U. S. 278, 68 L. Ed. 680."

In *Wells Fargo & Co. vs. Taylor,* 254 U. S. 175, 65 Law Ed. 205, the Supreme Court considers the meaning and

effect of the Statute here relied upon by appellees and says:

> "The provision has been in force more than a century, and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity, and, like that rule, is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the Federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which, of course, is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (Ex parte Young, 209 U. S. 123, 52 L. ed. 714; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131; Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533, 538, 543, 60 L. ed. 1148, 1154, 1156), *or prevent them from maintaining and protecting their own jurisdiction properly acquired and still subsisting, by enjoining attempts to frustrate, defeat, or impair it through proceedings in the state courts* (French v. Hay (French v. Stewart), 22 Wall. 250, 22 L. ed. 857; Julian v. Central Trust Co., 193 U. S. 93, 112, 48 L. ed. 629, 639; Chesapeake & O. R. Co. v. McCabe, 213

> U. S. 207, 219, 53 L. ed. 765, 770; Looney v. Eastern Texas R. Co., 247 U. S. 214, 221, 62 L. ed. 1084, 1087), or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience. (Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870; Ex parte Simon, 208 U. S. 144, 52 L. ed. 429; Simon v. Southern R. Co., 236 U. S. 115, 59 L. ed. 492; Public Service Co. v. Corboy, 250 U. S. 153, 160, 63 L. ed. 905, 908; National Surety Co. v. State Bank, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593.)"

From the foregoing authorities, it can be plainly seen that this action, having been instituted in January, 1934, and attacking the constitutionality and validity of the Agricultural Adjustment Act and of the Licenses purportedly issued thereunder, to-wit, Licenses Nos. 17 and 57, should restrain any proceedings between the *same parties,* wherein one of the defendants, to-wit, Milk Producers, Inc., institutes an action against one of the plaintiffs to recover a money judgment in the state courts for the deductions and charges claimed due under the provisions of License No. 17.

To permit the defendant, Milk Producers, Inc., to maintain such action and other and further actions against the other plaintiffs in this case, would lead to an endless confusion; for the state court might refuse to pass upon the constitutionality or validity of the federal questions involved, and order a money judgment in that case, and then this Court, as we believe, would declare the Act and the Licenses issued thereunder, void and unconstitutional,

and we would then have the picture of the first court acquiring jurisdiction, declaring the Act unconstitutional and a second court assuming jurisdiction many months after the institution of the first action, giving a judgment thereon. This would be an anomalous situation, and would lead to the very confusion and conflicts mentioned by the courts in the foregoing points and authorities.

Respectfully submitted,

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